

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE HIPSAVER COMPANY, INC.,
Plaintiff / Counterclaim Defendant,

v

J.T. POSEY COMPANY,
Defendant / Counterclaim Plaintiff.

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) Civil Action No. 05-10917 PBS
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**HIPSAVER'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT DISMISSING J.T. POSEY'S COUNTERCLAIM
AND IN FURTHER OPPOSITION TO POSEY'S CROSS MOTION FOR SUMMARY
JUDGMENT ON THE COUNTERCLAIM**

INTRODUCTION

Consideration of HipSaver's Motion and Supporting Memorandum for Summary Judgment Dismissing Posey's Counterclaims [D.N. 158, D.N. 159] and HipSaver's Opposition to Posey's Cross Motion [D.N. 180] is not about cliché or different "yardsticks". But it is about subject matter jurisdiction: Posey's Counterclaims are barred by *res judicata*. The Counterclaims amount to the identical challenge to HipSaver's web-site which was dismissed with prejudice in the 2004 lawsuit.¹ Posey doesn't get a second chance.

At the same time, Posey's Counterclaims cannot withstand Summary Judgment on the facts. And upon thorough review of the facts and a precise application of law to fact, the court will find that Posey's Counterclaims simply do not measure up. Posey has no damages and no loss of money or property to support a claim under the Lanham Act or c. 93A; and it has no basis for injunctive relief.

ARGUMENT

A. Posey's Counterclaims are Barred Under *Res Judicata*

Posey's Counterclaims are barred under *res judicata* and should be dismissed. As discussed more fully in HipSaver's Opposition to Posey's Motion for Partial Summary Judgment on Defendant's Counterclaims [D.N. 180] at p. 8, Posey's tit-for-tat counterclaim is a word for word, paragraph by paragraph recycling of the *same* old challenge made to the same web-site. But this challenge has already been adjudicated and dismissed with prejudice under Fed. R. Civ. P. 41 in the 2004 lawsuit. Accordingly, Posey is now barred by *res judicata* from a second chance at the same challenge.

¹ By contrast, HipSaver's Complaint in this case does not refer or apply in any manner to Posey's UCLA advertising which was the transaction challenged in 2004. This lawsuit is a challenge to Posey's Garwood advertising campaigns.

B. Posey Cannot Demonstrate Any Injury Sufficient to Support a Claim for Injunctive Relief

Having conceded that it has no damages, Posey now shifts to a Counterclaim for injunctive relief only. Posey fails, however, to provide any evidence from which a reasonable jury could conclude that HipSaver's web-site statements, even if proven literally false, would likely cause confusion or deceive consumers; and accordingly, Posey's claim for injunctive relief should be denied.

Posey fails to establish injury as required under First Circuit law because Posey has not offered *any* evidence that shows HipSaver's web-site advertising is likely to cause confusion or deceive customers in order to support a claim for injunctive relief:²

First, Posey concedes that it has suffered no damages. *See* Posey's Opposition to HipSaver's Motion For Summary Judgment on Posey's Counterclaims [**D.N.** 184].

Second, Posey concedes it has no evidence of actual consumer confusion or deception to support a claim for a likelihood of future injury. *See* Posey's Opposition to HipSaver's Motion for Summary Judgment on Posey's Counterclaims [**D.N.** 184] at p. 8. Posey has not cited even a single incident of a lost sale or a lost marketing opportunity or customer confusion related in any manner to HipSaver's web-site advertising.

The challenged statements on HipSaver's web-site have remained substantially the same since 2003 (**Exh.** 1, HipSaver web-site, February 2, 2003), and Posey admits no injury and no

² Something more than a "subjective belief" of injury is required to sustain such a showing of damage. *See* J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* 27:28 (1999); *McCarthy* at 2:8 (likelihood of confusion analysis is the same inquiry for trademark infringement and unfair competition analysis); *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154 (1st Cir. 1977)(stating that a showing "that the defendant's activities are likely to cause confusion or to deceive customers suffices to warrant injunctive relief").

damages suffered over the past four years and has no proof of actual confusion or deception.³ Without any evidence of actual confusion over four years, Posey's claim of potential consumer confusion is groundless. *See Aktiebolaget Electrolux v. Armatron Intern., Inc.*, 999 F.2d 1, 4 (1st Cir. 1993)(finding that "[w]eak evidence of actual confusion weighs quite heavily against a finding of likelihood of confusion... an absence of actual confusion...between two products after a long period of coexistence in the market is highly probative in showing that little likelihood of confusion exists").

Finally, Posey's actions demonstrate that its concern over the statements on HipSaver's web-site is contrived, just as it was in the 2004 Litigation. As detailed in HipSaver's Opposition to Posey's Motion for Partial Summary Judgment on Defendant's Counterclaims [**D.N.** 180] at p. 8, Posey challenged the same statements in its 2004 counterclaim when, then as now, it needed to create a tit-for-tat counterclaim. At settlement, Posey maintained utter silence with respect to its counterclaim challenge to HipSaver's web-site. Posey did not ask, suggest, request, or insist on any change, modification, alteration, or retraction of the statements on the HipSaver web-site, strongly suggesting that Posey did not have a good faith basis then, as now, for any likelihood of confusion or deception.

There is simply no support for Posey's contention that a likelihood of confusion would arise at this point in time and accordingly, Posey's claim of false advertising seeking injunctive relief should be dismissed.

³ Posey cites *Holmes Group v. RPS Products, Inc.*, 424 F.Supp. 2d 271, 292 (D. Mass. 2006) for the proposition that a presumption of likelihood of harm to goodwill may arise where the parties are in competition and that such harm to goodwill is sufficient to survive summary judgment. But, the facts of this case differ from those in *Holmes*. Here, the challenged statements on the HipSaver web-site have been posted since as early as February 2, 2003, and Posey can make no claim of injury. Moreover, apart from its tit for tat counterclaims, Posey has not otherwise objected to or sought revision of the web-site. This lack of actual confusion rebuts any presumption of future harm.

C. Posey Cannot Demonstrate Any Loss of Money or Property Sufficient to Support a Claim Under c.93 A

Through its damages expert, Posey has conceded that it has no damages on the Counterclaim, indeed, its sales have increased. *See* HipSaver's Opposition to Posey's Motion for Partial Summary Judgment on its Counterclaim [D.N. 180] at p.10. Posey has conceded also that it has no evidence of consumer confusion. *See* Posey's Opposition to HipSaver's Motion for Summary Judgment on Posey's Counterclaims [D.N. 184] at p. 8. Consequently, there is no evidence from which a reasonable jury could conclude that HipSaver's web-site statements would likely cause confusion or deceive consumers. Without evidence of injury or harm, Posey's claim for injunctive relief under c. 93A fails as a matter of law. *See* cases cited in HipSaver's Memorandum in Support of its Motion for Summary Judgment Dismissing Posey's Counterclaims [D.N. 159] at p.8-9.

D. Posey's Claim for Unfair Competition Fails Under Massachusetts Law

Posey can't rewrite Massachusetts law to conform to its claims. What the rule "should be" or "could be" is not relevant. The Supreme Judicial Court has decided that under Massachusetts law, "the gravamen of an unfair competition claim is the likelihood of consumer confusion as to the source of the goods or services." *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 769 (1986). The First Circuit agrees that this consumer source confusion requirement for Massachusetts unfair competition law is "settled." *Open Software Found., Inc. v. U.S. Fid. and Guar. Co.*, 307 F.3d 11, 17 (1st Cir. 2002)(internal quotation omitted); *see e.g. American Telephone & Telegraph Co. v. IMR Capital Corp.*, 888 F.Supp. 221, 246-247 (D. Mass. 1995) (finding no facts suggesting unfair competition where party complained of competitor's disparaging remarks).

Posey admits that “Posey has not shown actual consumer confusion.” Posey’s Opposition to HipSaver’s Motion for Summary Judgment on Posey’s Counterclaims [D.N. 184] at p. 8. Posey has never even alleged consumer source confusion. Accordingly, under the law of this Circuit, Posey’s claim under common law unfair competition fails as a matter of law and should be dismissed.

CONCLUSION

For the reasons stated in HipSaver’s Memorandum in Support of its Motion For Summary Judgment Dismissing J.T. Posey’s Counterclaims and repeated here, HipSaver requests dismissal of Posey’s Counterclaims under the Lanham Act, c.93A, common law breach of contract, and common law unfair competition.

Respectfully submitted,
The HipSaver Company, Inc.
By its Attorneys,

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January 18, 2007

CERTIFICATE OF SERVICE

I certify that this document has been filed through the Electronic Case Filing System of the United States District Court for the District of Massachusetts and will be served electronically by the court to the Registered Participants identified in the Notice of Electronic filing.

/s/ Edward J. Dailey _____
January 18, 2007

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Exhibit 1

[HOME](#)[HIPSAVER MODELS](#)[VALIDATION & TESTING](#)[INDUSTRY COMPARISONS](#)[HIP PROTECTORS & THE LAUNDRY](#)[TESTIMONIALS](#)[ORDER IN THE USA](#)[WORLDWIDE DISTRIBUTORS](#)[CONTACT US](#)

PREVENT DEVASTATING HIP INJURY WITH THE ONLY SCIENTIFICALLY VALIDATED SOFT HIP PROTECTOR

Nurses, therapists, fall prevention and risk management teams are seeing the benefits of HipSavers in over 5,000 Veterans Hospitals, nursing homes, hospitals and elder communities.

- Machine wash & dry — even in high institution temperatures — Won't fall apart or degrade like competitive products
- Comfortable enough to wear all day AND to sleep in
- Proven effective in scientific testing, and over 7 years on the market
- Manufactured in the USA using only high quality, USA materials
- Variety of models to meet care-giver and wearer's needs

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HIPSAVER MODELS

- ☐ HipSaver® Nursing Home
- ☐ HipSaver® QuickChange™
- ☐ HipSaver® Wrap&Snap™
- ☐ HipSaver® SlimFit™
- ☐ HipSaver® Open-Bottom™

HIPSAVER SIZE CHART

HIPSAVER MODEL SELECTION GUIDE

HIPSAVER PROGRAM IMPLEMENTATION

HIPSAVER ADVANTAGES

HIPSAVER MODELS FOR PROFESSIONAL CARE-GIVERS

- **Proven**
Validated in biomechanical testing and clinical study. Used in more than 5,000 institutions worldwide for over 7 years!
- **Comfortable**
All-soft, thin tapered padding. Soft enough to sleep in.
- **Institution Wash-and-Dry**
Machine wash-and-dry — even at high institutional temperatures. Won't fall apart or degrade like competitive products.
- **Superior**
Breakthrough design — refined and improved in more than 10 years of development. High quality materials and processes insure the best hip protector available.
- **Affordable**
Low-overhead & factory-direct pricing — for savings that really add up!

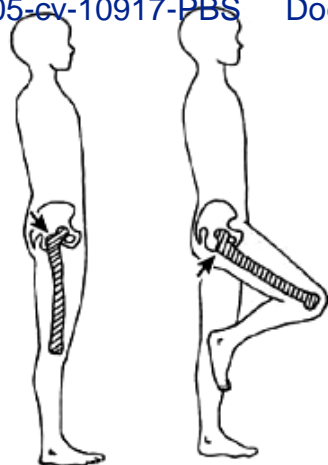
All HipSaver hip protectors are a durable polycotton construction with soft pads permanently sewn in to cover each trochanter. The visco-elastic foam pads are radio-frequency sealed into a high temperature tolerant waterproof pouch.

HipSaver hip protectors are soft and comfortable to increase compliance, scientifically validated and GUARANTEED to be machine wash-and-dry even in high temperatures used in institution laundries.

HipSaver hip protectors come in a variety of models to best meet the needs of the residents and the caregivers:

- [HipSaver® Nursing Home Model](#)
- [HipSaver® QuickChange™](#)
- [HipSaver® Wrap&Snap™](#)
- [HipSaver® SlimFit™](#)
- [HipSaver® Open-Bottom™](#)
- [EZ Pull-Up handles](#)
- [Cool-Dry Lining](#)
- [SIZE CHART](#)
- [HIPSAVER MODEL SELECTION GUIDE](#)
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The hip bone is actually the top of the thigh bone and is shaped similar to a small light bulb. You can feel this bony ball by placing your fingertips on the side of the hip and while raising the knee slightly, noting the movement of the underlying bone.

This is not to be confused with the pelvic bone which is higher, more toward the front and does not move when the knee is raised. Fit should be snug to insure proper pad placement.

Label:

Label the HipSaver with the resident's name.

Educate & encourage compliance:

Educate residents and family about serious consequences of hip fracture, note that wearing HipSavers may allow less restraint, more freedom to move about. Demonstrate the softness and comfort of HipSavers. Encourage uninterrupted wear, even while sleeping.

Ongoing & follow-up:

Add "HipSaver Wearer" to treatment chart or use the free "HipSaver Wearer" labels available from HipSaver.

Train clinical staff.

Keep records of all falls and any injuries.

Support:

Email us at hipsavers@msn.com or call HipSaver toll-free at **1-800-358-4477** for answers to your questions or to discuss any issues.

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HIPSAVER ADVANTAGES

What to look for in a hip protector... ***The HipSaver Advantage***

Clinical Validation

HipSaver is the only soft pad hip protector that has clinical validation. HipSaver's biomechanical test results from 2 prestigious Universities are superior to hard shell hip protectors. A two-year published study reported a zero percent fracture rate in 199 falls of high risk elderly individuals.

When evaluating a hip protector, be sure that testing reports are from Universities using clinically accepted protocols not simple impact tests from a commercial lab. Also, ask for copies of clinical studies to ascertain that the studies cited refer to that specific brand and not hip protectors in general.

Comfort

HipSaver pads are all soft, thin and tapered — designed for maximum comfort to increase compliance rates while offering proven protection. Six sizes ensure proper fit.

Sewn-in pads

HipSaver's sewn-in pads are more convenient. Sewn-in pads can't get lost during laundering or be removed by residents. Sewn-in pads are more cost effective — which reduce labor time inserting and removing.

"When used in institutions, it is recommended that the hip protector shields are sewn into the underwear to reduce staff effort and time."

*— Ian D. Cameron, Assoc. Professor of Rehabilitation
Medicine, University of Sidney, Australia
British Medical Journal 16 February 2002*

Machine wash & dry at high temperatures

HipSavers are designed to be machine washed and dried in institution laundries-up to 250°
>

History & track record

HipSavers have been used around the world in thousands of nursing homes, Veterans Hospitals, and elder communities for over 7 years. The record shows their effectiveness, durability and high compliance rate.

HipSaver is the first hip protector to encapsulate soft padding in an airtight, waterproof pouch. Beware of look-alike products introduced within the past year that use inferior materials.

Variety of Models

Only HipSaver offers the greatest range of adaptive styles and models. HipSaver is constantly testing new innovations to add to the HipSaver product line.

While HipSaver has achieved excellent and impressive results, no product can claim to be 100% effective all of the time. Therefore HipSaver, Inc. makes no implied or express guarantee that its product will prevent injury.



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HIP PROTECTORS & THE LAUNDRY

Only HipSaver hip protectors clearly meets the CDC Guidelines for infection control in the laundry

Compare:

HipSavers® wash and dry up to 250° — well above the CDC guidelines.





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Hip Protector Feature or Benefit	HipSaver®	Posey® "Hipster"	AliMed® Hipshield
Proven effective in published clinical study	YES	NO	NO
Proven effective in orthopedic biomechanical test	YES	NO	NO
High compliance rate documented in published study	YES	NO	NO
Proven successful on the market	YES (7+ years)	NO (1 yr.)	NO (less than 6 mos)
Machine wash & dry at high institutional temperatures	YES (250° F)	NO (160° F)	NO (low temp.)
Reinforced snaps on incontinence models for durability	YES	NO	N/A
Tapered pads for maximum comfort	YES	NO	NO
Optional tailbone protector available	YES	NO	NO
Adaptive models to meet varied patients' needs	YES	NO	NO
Six sizes (XS - XXL) for a proper fit	YES	NO	NO
Original inventor of watertight encapsulated pad	YES	NO	NO
Company devoted exclusively to hip protection	YES	NO	NO

**Don't be fooled by big-name suppliers with inferior look-alike products.
Compare HipSaver and the choice is clear.**

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PRODUCT VALIDATION & TESTING

HipSaver was introduced in 1994 by Ed Goodwin, consumer products engineer trained to develop effective consumer-friendly products. This training is evident in HipSaver products.

Since 1994, tens of thousands of HipSavers have been sold to nursing homes, elder communities and individual active seniors. HipSaver is fast becoming the preferred choice of VA Long term care units, nursing homes and structured Elder Service Plans such as PACE Communities, around the country and around the world.

Early investigators proposed hard "shunting" shells as the preferred hip protector means but recent independent university biomechanical tests conclude that the HipSaver airPad™ can be more effective in shock force reduction than the hard shell. The HipSaver hip protector therefore offers better protection without the discomfort of hard shell protectors.

HipSaver® – the only proven, all-soft hip protector.

Why is this important to you?

Independent biomechanical testing and clinical validation are crucial for a hip protector. Without them, you won't know IF it works until it HAS to work. And that is too late.

Think of it this way...which parachute would you choose?

One manufactured by a company with proven testing, independent scientific validation and years of market success or one that looks similar but has no performance data or market history.

Don't Settle for Less...

Insist on original, independently validated HipSaver!

It takes more than foam pads and underwear to provide all-soft hip protection that works! Beware of imitators seeking to cash in on years of HipSaver research, development and testing in materials, processes and actual use.

Only HipSaver products have the unique patent-pending dual-mechanism shunting/absorbing HipSaver® airPad™ – a system shown to deliver significant impact reduction in independent testing.

In the event of a fall, the HipSaver airPad absorbs impact and inflates the pouch. Acting as a miniature automobile air bag, it shunts force away from the vulnerable hipbone to the soft tissue of the buttocks.

HipSavers are the only all-soft hip protectors, proven effective – in both independent biomechanical testing and clinical study.

From a published clinical study...

The ***Elder Service Plan of the East Boston Neighborhood Health Center*** conducted a study to investigate the efficacy of HipSavers.

In this controlled study, the group wearing HipSaver hip protector underwear had a 0% fracture rate (199 falls over 26 months) compared to a 4.3% fracture rate (369 falls over 26 months) for the less at-risk control group. Today, after more than four years and over 400 falls, there still has not been a single fracture among HipSaver wearers.



[Click here to see this study](#), published in ***Advance for Physical Therapists*** (Vol.11, Number 22, pp 45-46) October 30, 2000 (PDF).

Biomechanical Testing

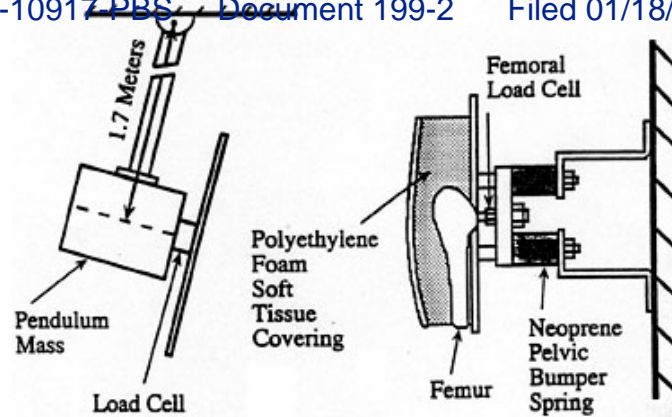
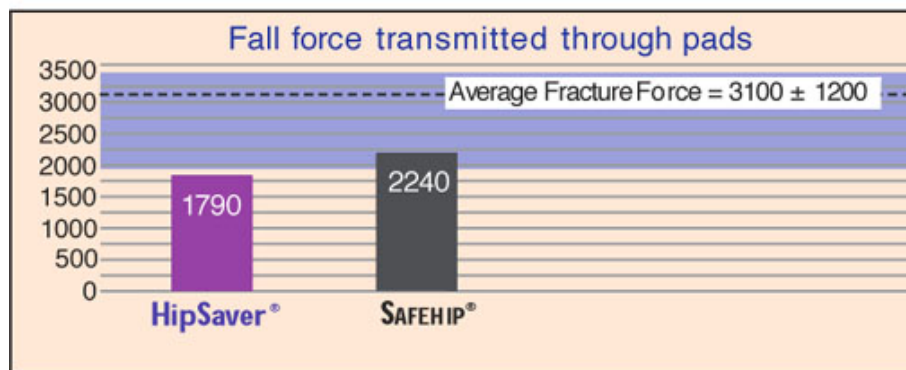


Illustration of Biomechanical Testing Apparatus at Harvard University

HipSaver has been independently tested at two prestigious Universities: A mechanical pelvis was used to record pad protective effect in a simulated fall condition of an elderly person. These tests, conducted at Harvard University and Tampere University of Technology in Finland, two of the leading researchers of hip protection, relate the protective effect of pads to the literature-established bone fragility of an elder person's trochanter.



Results show the HipSaver airPad™; technology reduced the force of impact from 7300 Newtons to 1790 Newtons – that's more than 20% more force reduction than the hard-shell protection.

(Average fracture force: 3100 N +/- 1200 N)



[Click here to view Biomechanical Test Documentation](#) published in *Bone* (August 25, 1999, (2):229-235) and HipSaver test report from *Tampere University of Technology*, Finland, Sept. 15, 2000.

In order to view certain documents, the latest Adobe Acrobat Reader will be required. Simply click on the "Get Acrobat Reader" icon below to download this free software:



Email us at hipsavers@msn.com or call HipSaver toll-free at **1-800-358-4477** for answers to your questions or to discuss any issues.

While HipSaver has achieved excellent and impressive results, no product can claim to be 100% effective all of the time. Therefore HipSaver, Inc. makes no implied or express guarantee that its product will prevent injury.

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